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# Speech-Conditioned Funding and the First Amendment: New Standard, Old Doctrine, Little Impact

Heather Blakeman\*

## I. INTRODUCTION

¶1 The freedom of speech is so engrained in American society that “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>1</sup> Yet, Congress frequently conditions federal funding allocations on requirements that recipients refrain from or engage in certain speech.<sup>2</sup> A recent Supreme Court decision articulated a new standard to determine when a funding condition that implicates speech is a proper exercise of Congress’s power under the Spending Clause and when the condition unconstitutionally burdens recipients’ First Amendment rights.<sup>3</sup> In *Agency for International Development v. Alliance for Open Society International, Inc. (AOSI)*, the Court enjoined enforcement of a provision of the Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act (Leadership Act), finding that the requirement that organizations implementing the Act adopt a policy explicitly opposing prostitution<sup>4</sup> was an unconstitutional restriction of their right to free speech.<sup>5</sup>

¶2 Enacted in 2003, the Leadership Act appropriated \$48 billion to improve research, treatment, and prevention programs to combat the international spread of HIV/AIDS.<sup>6</sup> In response to findings that “the sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic,” Congress placed two conditions on the receipt of Leadership Act funding.<sup>7</sup> First, the Act stipulates that funding may not be used to “promote or advocate the legalization or practice of prostitution or sex trafficking.”<sup>8</sup> Second, under what is known as the Policy Requirement, no organization that lacks a “policy explicitly opposing prostitution and sex trafficking” may receive funding under the Act, except for

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<sup>1</sup> *USAID v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2332 (2013) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

<sup>2</sup> *See infra* text accompanying notes 57–85.

<sup>3</sup> *See AOSI*, 133 S. Ct. at 2327–28, 2332.

<sup>4</sup> U.S. Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act, 22 U.S.C. § 7631(f) (2008).

<sup>5</sup> *AOSI*, 133 S. Ct. at 2332.

<sup>6</sup> 22 U.S.C. §§ 7601–82 (2008).

<sup>7</sup> *Id.* §§ 7601–23.

<sup>8</sup> *Id.* § 7631(e).

the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative, and any United Nations agency.<sup>9</sup>

¶3 This article analyzes the Supreme Court’s decision in *AOSI* to strike down the Policy Requirement and argues that the Court articulated a new speech-conditioned funding standard, distinguishing between conditions that “define the limits of the government spending program” and those that “seek to leverage funding to regulate speech outside the contours of the program itself.”<sup>10</sup> This “limits–leverage” standard consolidated existing speech-conditioned funding doctrines, combining their application to funding conditions that implicate speech. The standard protects the primary justification for protecting recipients’ freedom of speech in conditional funding cases—the development of knowledge—by preserving their ideas and opinions on matters of public debate. In practice, however, the standard will not protect the speech of most recipients of speech-conditioned foreign aid. Since the 1980s, Congress has relied increasingly on foreign organizations to deliver developmental and humanitarian aid, as they generally have greater access to areas and people in need of foreign aid than their American counterparts.<sup>11</sup> Because Congress can allocate foreign aid funds to foreign recipients, who are not entitled to First Amendment protection,<sup>12</sup> instead of to U.S. recipients, it can bypass the constitutional limits on speech-conditioned foreign aid funding. Thus, although conditions that “leverage funding to regulate speech outside the contours of the program”<sup>13</sup> exceed Congress’s power under the Spending Clause, they will nonetheless prevail with respect to foreign organizations who implement U.S. foreign aid programs.

¶4 Part II of this article reviews the system of U.S. foreign aid funding and the history of the Leadership Act, the Act challenged in *AOSI*. Part III discusses the congressional spending power and the limits imposed on it by the unconstitutional conditions doctrine. Part IV details the state of First Amendment doctrine with respect to funding conditions prior to *AOSI*. Part V describes the litigation leading up to *AOSI*. Part VI asserts that the Supreme Court in *AOSI* articulated a new standard to determine when a funding condition that implicates free speech is an unconstitutional burden on recipients’ free speech: whether the condition leverages the congressional spending power to control speech beyond the federal funding program. Part VII contends that this standard advances the primary justification behind protecting funding recipients from conditions that restrict their free speech—the development of knowledge and truth—by preserving a variety of opinions in the “marketplace of ideas.” Finally, Part VIII argues that in practice, the *AOSI* standard will not protect free speech in foreign aid funding programs because

<sup>9</sup> *Id.* § 7631(f). Initially, the Policy Requirement was not enforced against U.S. NGOs. Declaration of Paul P. Colborn at 13, *Brennan Ctr. for Justice v. U.S. Dep’t of Justice*, No. 09-CV-8756(VM), 2011 WL 4001146 (S.D.N.Y. Aug. 30, 2011). The Department of Justice warned that the restriction “would prevent or require certain advocacy or positions in activities completely separate from the federally funded programs . . . [and] cannot be constitutionally applied to U.S. organizations.” *Id.* However, in 2005, the Bush administration began enforcing the requirement against U.S. NGOs. *Id.*

<sup>10</sup> *AOSI*, 133 S. Ct. at 2328.

<sup>11</sup> See USAID, FOREIGN AID IN THE NATIONAL INTEREST: PROMOTING FREEDOM, SECURITY, AND OPPORTUNITY 117 (2002).

<sup>12</sup> *DKT Memorial Fund Ltd. v. USAID*, 887 F.2d 275, 284 (D.C. Cir. 1989) (“[T]he Supreme Court has never limited its absolute wording of the principle that nonresident aliens are without First Amendment rights.”).

<sup>13</sup> *AOSI*, 133 S. Ct. at 2328.

Congress will eschew its restrictions by confining fund allocation to foreign recipients, who are not protected by the First Amendment. Part IX concludes.

## II. FEDERAL FUNDING FOR FOREIGN AID

### A. Foreign Aid

¶5 Foreign aid has long been an instrument of U.S. foreign policy.<sup>14</sup> While the President has primary responsibility and power to set U.S. foreign policy objectives, Congress allocates funds to agencies to implement those policies.<sup>15</sup> The U.S. Agency for International Development (USAID) is the primary agency through which Congress distributes foreign aid, established to promote democracy internationally and to provide aid to developing foreign states.<sup>16</sup> The Department of Health and Human Services (HHS) and the Centers for Disease Control (CDC) also distribute foreign aid funds.<sup>17</sup> Foreign policy, the allocation of foreign aid, and the imposition of conditions on foreign aid funds all work together to contribute to national interests achieved internationally.<sup>18</sup>

¶6 Throughout American history, and especially today, civil society and nongovernmental organizations (NGOs) have shared an intimate relationship. Specifically, nonprofit organizations enjoy a significant role in the social and political landscape of the country act as laboratories for social change and strategies not feasible by the U.S. government;<sup>19</sup> the U.S. nonprofit sector consists of an estimated 1.58 million

<sup>14</sup> Alexander L. George & Robert O. Keohane, *The Concept of National Interests: Uses and Limitations*, in *PRESIDENTIAL DECISIONMAKING IN FOREIGN POLICY: THE EFFECTIVE USE OF INFORMATION AND ADVICE* 217, 218 (Alexander L. George ed., 1980) (“The concept of national interest continues to be important to foreign-policymakers . . . . They have used the concept in two different ways: first, as a *criterion* to assess what is at stake in any given situation and to evaluate what course of action is ‘best’; second, as a *justification* for decisions taken.”).

<sup>15</sup> Richard F. Grimmett, U.S. Dep’t of State, Foreign Policy Roles of the President and Congress (June 1, 1999), available at <http://fpc.state.gov/6172.htm>.

<sup>16</sup> *Who We Are*, USAID, <http://www.usaid.gov/who-we-are/> (last visited Dec. 3, 2014) (“USAID is the lead U.S. government agency that works to end extreme global poverty and enable resilient, democratic societies to realize their potential . . . . U.S. foreign assistance has always had the twofold purpose of furthering America’s [foreign policy] interests while improving lives in the developing world . . . . Spending less than 1 percent of the total federal budget, USAID works in over 100 countries” to accomplish its goals of “protect[ing] human rights” and “improv[ing] global health.”).

<sup>17</sup> See CURT TARNOFF & MARIAN LEONARDO LAWSON, CONG. RESEARCH SERV., R40213, FOREIGN AID: AN INTRODUCTION TO U.S. PROGRAMS AND POLICY 21–23 (2011). International developmental aid is also promulgated by the U.S. State Department. *Id.*

<sup>18</sup> See Felix E. Oppenheim, *National Interest, Rationality, and Morality*, 15 *POL. THEORY* 369, 369–70 (1987). The granting of foreign aid to another nation can directly and indirectly serve U.S. national interests. See Alexander L. George & Robert O. Keohane, *The Concept of National Interests: Uses and Limitations*, in *PRESIDENTIAL DECISIONMAKING IN FOREIGN POLICY: THE EFFECTIVE USE OF INFORMATION AND ADVICE* 217 (Alexander L. George ed., 1980) (“Foreign-policy problems . . . typically engage a multiplicity of competing values and interests . . . . In principle, the criterion of national interest, which occupies so central a place in discussions of foreign policy, should assist decision-makers to cut through much of this value complexity . . .”).

<sup>19</sup> See LESTER M. SALAMON & S. WOJCIECH SOKOLOWSKI, *GLOBAL CIVIL SOCIETY: DIMENSIONS OF THE NONPROFIT SECTOR* 23 (2004) (“By establishing connections among individuals, involvement in associations teaches norms of cooperation that carry over into political and economic life.”); see also

organizations that contributed \$836.9 billion to the U.S. economy in 2011, making up 5.6 percent of the country's gross domestic product (GDP).<sup>20</sup> NGOs also contribute significantly to American society and identity through public charity.<sup>21</sup> Finally, the diverse range of viewpoints among NGOs allows for competition among relevant interests and thus enhances civic engagement and democracy.<sup>22</sup> The nonprofit sector serves an indispensable role in the fair functioning of the country and in promoting the interests and welfare of its people.<sup>23</sup>

Foreign aid funds conditioned on certain requirements of recipient NGOs help Congress to further its international policy goals. As the primary agency distributing U.S. foreign aid, USAID frequently collaborates with foreign NGOs to implement U.S. foreign policy goals within targeted countries.<sup>24</sup> While distributing funds that Congress appropriates for governmental initiatives, USAID "has always had the twofold purpose of furthering America's interests while improving lives in the developing world."<sup>25</sup> Given the efficiency of enlisting an organization with expertise in any given area, the government has increasingly enlisted NGOs to deliver publicly financed services, and thus government funding has become the most important source of income for most charitable nonprofit organizations;<sup>26</sup> government funds supply almost a third of nonprofit

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ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 133 (1898) (arguing that American democracy relies on the strength and influence of non-governmental associations). "As soon as several of the inhabitants of the United States have taken up an opinion or a feeling which they wish to promote in the world, they look out for mutual assistance; and as soon as they have found each other out, they combine." *Id.*

<sup>20</sup> SARAH L. PETTIJOHN, *URBAN INST., THE NONPROFIT SECTOR IN BRIEF: PUBLIC CHARITIES, GIVING, AND VOLUNTEERING* 1 (Oct. 16, 2013), available at <http://www.urban.org/UploadedPDF/412923-The-Nonprofit-Sector-in-Brief.pdf>.

<sup>21</sup> *See id.* ("Of the nonprofit organizations registered with the IRS, 501(c)(3) public charities accounted for more than three-quarters of the nonprofit sector's revenue and expenses . . . . In 2012, total private giving from individuals, foundations, and businesses exceeded \$300 billion . . . for the first time since the recession started . . . .").

<sup>22</sup> *See* J. Craig Jenkins, *Nonprofit Organizations and Political Advocacy*, in *NONPROFIT SECTOR: A RESEARCH HANDBOOK* 307, 308 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006) ("Interests are diverse and inherently subjective. One person's 'public good' may be another's 'public bad.' Those who claim to speak in the name of the general public can claim no privileged insight.").

<sup>23</sup> *See* JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* 122 (John Gray ed., Oxford University Press 1991) (1859) ("Government operations tend to be everywhere alike. With individuals and voluntary associations, on the contrary, there are varied experiments, and endless diversity of experience.").

<sup>24</sup> CURT TARNOFF & MARIAN LEONARDO LAWSON, *CONG. RESEARCH SERV., R40213, FOREIGN AID: AN INTRODUCTION TO U.S. PROGRAMS AND POLICY* 21–23 (2011); *see* USAID, *FOREIGN AID IN THE NATIONAL INTEREST: PROMOTING FREEDOM, SECURITY, AND OPPORTUNITY* 117 (2002), available at [http://www.au.af.mil/au/awc/awcgate/usaid/foreign\\_aid\\_in\\_the\\_national\\_interest-full.pdf](http://www.au.af.mil/au/awc/awcgate/usaid/foreign_aid_in_the_national_interest-full.pdf).

<sup>25</sup> *Who We Are*, USAID, <http://www.usaid.gov/who-we-are> (last updated Jan. 29, 2014).

<sup>26</sup> *See* STEVEN RATHGEB SMITH & MICHAEL LIPSKY, *NONPROFITS FOR HIRE: THE WELFARE STATE IN THE AGE OF CONTRACTING* 4 (1993) ("Rather than relying mostly on private charity and volunteers, most nonprofit service organizations depend on governmental support for over half of their revenues: for many, government support comprises their entire budget. In contrast to the traditional image of government and nonprofits as two independent sectors, the new relationship amounts to one of mutual dependence."); *see also* LESTER M. SALAMON, *AMERICA'S NONPROFIT SECTOR: A PRIMER* 13 (2d ed. 1999) ("[There is] often a preference for some nongovernmental mechanism to deliver services and respond to public needs because of the cumbersomeness, unresponsiveness, and bureaucratization that often accompanies governmental action . . . . Even when government financing is viewed as essential . . . it is often the case that private, nonprofit organizations are utilized to deliver the services that government finances.").

revenues, more than twice as much as private charitable giving.<sup>27</sup> The government and the nonprofit sector are mutually dependent on each other to make public service works possible.<sup>28</sup>

### B. *The Leadership Act*

¶8 Although the U.S. government has been combatting the spread of HIV/AIDS since 1986,<sup>29</sup> 2001 brought the epidemic into the international spotlight, when the United Nations adopted the Declaration of Commitment on HIV/AIDS, urging members to establish policies and dedicate aid towards the prevention, treatment, and collaboration needed to stop and reverse the HIV/AIDS pandemic.<sup>30</sup> UNAIDS estimated 35.3 million people were living with HIV in 2012, with 2.3 million new HIV infections globally.<sup>31</sup> In response to urging from President George W. Bush, Congress enacted the Leadership Act in 2003 to combat the global spread of the diseases.<sup>32</sup> Congress's stated purpose of the Act is "to strengthen and enhance United States leadership and the effectiveness of the United States response to the HIV/AIDS, tuberculosis, and malaria pandemics and other related and preventable infectious diseases as part of the overall United States health and development agenda."<sup>33</sup> The Leadership Act prescribes, *inter alia*, a comprehensive strategy to fight the international spread of HIV/AIDS.<sup>34</sup> Pursuant to that plan, Congress appropriated \$48 billion to the Executive Branch to allocate to NGOs and foreign governments<sup>35</sup> to improve treatment and prevention programs, especially for those at high risk of contracting HIV/AIDS, and to improve technical assistance, training and research.<sup>36</sup>

¶9 In response to findings that "the sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic,"<sup>37</sup> Congress placed two conditions on the receipt of funding. First, funding may not be used to "promote or advocate the legalization or practice of prostitution or sex trafficking."<sup>38</sup> Second, under what is known as the Policy Requirement, no organization that lacks a "policy explicitly opposing prostitution and sex

<sup>27</sup> SARAH L. PETTIJOHN, URBAN INST., *THE NONPROFIT SECTOR IN BRIEF: PUBLIC CHARITIES, GIVING, AND VOLUNTEERING* 3 (Oct. 16, 2013), available at <http://www.urban.org/UploadedPDF/412923-The-Nonprofit-Sector-in-Brief.pdf>.

<sup>28</sup> For how insufficient government funding has an injurious effect on both nonprofit organizations and the general public, see NAT'L COUNCIL OF NONPROFITS, *COSTS, COMPLEXIFICATION, AND CRISIS: GOVERNMENT'S HUMAN SERVICES CONTRACTING "SYSTEM" HURTS EVERYONE* (Oct. 7, 2010), available at <http://www.govtcontracting.org/sites/default/files/Costs%20Complexification%20and%20Crisis.pdf>.

<sup>29</sup> *HIV and AIDS*, U.S. AGENCY FOR INT'L DEV., <https://www.usaid.gov/what-we-do/global-health/hiv-and-aids> (last visited Sept. 27, 2014).

<sup>30</sup> G.A. Res. S-26/2, U.N. Doc. A/RES/S-26/2 (June 27, 2001).

<sup>31</sup> UNAIDS, *GLOBAL REPORT: UNAIDS REPORT ON THE GLOBAL AIDS EPIDEMIC 4* (2013), available at [http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2013/gr2013/UNAIDS\\_Global\\_Report\\_2013\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2013/gr2013/UNAIDS_Global_Report_2013_en.pdf).

<sup>32</sup> See 22 U.S.C. §§ 7601–25, 30 (2006).

<sup>33</sup> *Id.* § 7603.

<sup>34</sup> *Id.* § 7603.

<sup>35</sup> *Id.* §§ 7671(a), 7631.

<sup>36</sup> *Id.* § 7611(a).

<sup>37</sup> *Id.* §§ 7601–23.

<sup>38</sup> *Id.* § 7631(e).

trafficking” may receive funding under the Act, except for the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative, and any United Nations agency.<sup>39</sup> The Policy Requirement prohibits non-exempted recipients from “engag[ing] in activities that are inconsistent with their opposition to prostitution and sex trafficking.”<sup>40</sup> Further, affected recipients must state in their funding documents that they are “opposed to the practices of prostitution and sex trafficking *because of* the psychological and physical risks they pose for women, men, and children.”<sup>41</sup>

### III. CONGRESSIONAL SPENDING AND ITS LIMITS

#### A. Congressional Spending Power

¶10 Congress enjoys expansive powers to authorize funding to advance its policy goals.<sup>42</sup> The Constitution grants Congress the power to lay and collect taxes “to pay the Debts and provide for the common Defence and general Welfare of the United States.”<sup>43</sup> Under the Spending Clause, Congress has broad discretion to spend for the general welfare, which includes the power to fund particular governmental or private programs or activities.<sup>44</sup> Incident to this power, Congress may impose limits on the use of federal funds to ensure that recipients spend them according to congressional intent.<sup>45</sup> Thus, Congress may use conditional funding to induce behavior that it could not regulate directly.<sup>46</sup>

<sup>39</sup> *Id.* § 7631(f). Initially, the Policy Requirement was not enforced against U.S. NGOs. Declaration of Paul P. Colborn at 13, *Brennan Ctr. for Justice v. U.S. Dep’t of Justice*, No. 09-CV-8756(VM), 2011 WL 4001146 (S.D.N.Y. Aug. 30, 2011). The Department of Justice warned that the restriction “would prevent or require certain advocacy or positions in activities completely separate from the federally funded programs . . . [and] cannot be constitutionally applied to U.S. organizations.” *Id.* However, in 2005, the Bush administration began enforcing the requirement against U.S. NGOs. *Id.*

<sup>40</sup> HHS Organization Integrity of Entities That Are Implementing Programs and Activities Under the Leadership Act, 75 Fed. Reg. 18,760, 18,760 (Apr. 13, 2010) (codified in part at 45 C.F.R. § 89 (2014)); *see also* USAID Acquisition & Assistance Policy Directive 05-04 amend. 3, Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, as amended – Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking (2010).

<sup>41</sup> 45 C.F.R. § 89.1 (2014) (emphasis added).

<sup>42</sup> *United States v. Butler*, 297 U.S. 1, 65–66 (1936) (“Congress . . . has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States.”).

<sup>43</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>44</sup> *USAID v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2327 (2013).

<sup>45</sup> *E.g.*, *S.D. v. Dole*, 483 U.S. 203, 206 (1987) (holding that Congress may condition federal highway funds on a requirement that states prohibit the purchase and possession of alcohol by a person who is less than twenty-one years of age under the spending power).

<sup>46</sup> *Id.* at 206–07 (“Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.” (internal quotation marks omitted)); *see also Butler*, 297 U.S. at 66 (“[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by direct grants of legislative power found in the Constitution.”).

### B. Unconstitutional Conditions Doctrine

¶11 While the Spending Clause accords Congress extensive power to administer and condition funds, such conditions must not be unconstitutional.<sup>47</sup> Generally, when “a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds.”<sup>48</sup> However, the unconstitutional conditions doctrine provides that the “government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.”<sup>49</sup> Thus, a condition that coerces recipients into relinquishing their constitutional rights, for example, by leaving recipients no practical choice but to accept the funds, is an unconstitutional condition.<sup>50</sup> In a seminal unconstitutional conditions case, *Speiser v. Randall*, the Supreme Court held that a state law that conditioned veterans’ receipt of a property tax exemption (reasoned to be equivalent to a cash grant) on a declaration that they would not advocate the overthrow of the government impermissibly coerced the individuals to refrain from constitutionally protected speech.<sup>51</sup>

¶12 Although a condition that infringes on a recipient’s constitutionally protected rights is unlawful “even if he has no entitlement to that benefit,”<sup>52</sup> the Court has upheld conditions that are merely decisions by Congress not to subsidize a particular message or activity.<sup>53</sup> The Court has rejected the “notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.”<sup>54</sup> A series of doctrines has developed to determine whether federal funds conditioned on infringements of free speech are permissible exercises of the congressional spending power or whether they unconstitutionally encroach on recipients’ First Amendment rights.

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<sup>47</sup> *Dole*, 483 at 208–09 (establishing the general standard of review for congressional conditional spending: (1) spending must be in pursuit of the “general welfare”; (2) Congress must unambiguously declare the condition such that the recipient can make an informed decision as to whether to accept the funds; (3) the condition must be rationally related to the government’s interest in the funding; and (4) the condition may not be otherwise unconstitutional).

<sup>48</sup> *AOSI*, 133 S. Ct. at 2328.

<sup>49</sup> Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989).

<sup>50</sup> See *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

<sup>51</sup> *Id.* at 518 (“To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.”).

<sup>52</sup> See *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 210 (2003) (“Under this doctrine, the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.” (alteration in original) (internal quotation marks omitted)).

<sup>53</sup> See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (upholding a condition on family planning funds that prevented recipients from using the funds in programs where abortion was a method of family planning, finding that Congress could “selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.”); see also *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 546 (1983) (upholding a restriction on tax-exempt organizations that prohibited them from lobbying because “Congress has simply chosen not to pay for TWR’s lobbying.”).

<sup>54</sup> *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring); see also *Regan*, 461 U.S. at 549 (“[A] legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.”).



## IV. SPEECH-CONDITIONED FUNDING DOCTRINE

¶13 Congress frequently offers funds to organizations on a condition that they refrain from or engage in certain speech.<sup>55</sup> Such conditional funding requires courts to balance Congress’s broad spending power with the unconstitutional conditions doctrine by making value decisions as to “what speech is protected, under what circumstances, and when and how the government may regulate” to ensure funds are used appropriately.<sup>56</sup> The Supreme Court has developed a complex set of doctrines to conduct this balancing, applying different tests in particular contexts. These doctrines determine when speech-related conditions unconstitutionally burden recipients’ First Amendment rights.

A. *The Alternative Channels Test*

¶14 To determine whether a funding condition that implicates free speech is unconstitutional, the Court has assessed whether the restriction precludes alternative channels for expression. If the recipient does not have an adequate venue through which to express the restricted speech, the restriction is unconstitutional.<sup>57</sup> In *Federal Communications Commission v. League of Women Voters of California*, a condition that prohibited television station recipients of federal funds for public broadcasting from engaging in any editorializing left recipients without an alternative venue of expression because it prevented their “speech” (editorializing) regardless of whether it was publicly or privately funded.<sup>58</sup> Thus, the condition was unconstitutional because it did not allow for adequate alternative channels of expression.<sup>59</sup>

¶15 By contrast, in *Regan v. Taxation with Representation of Washington*, the Court upheld a requirement that nonprofit organizations seeking tax exemption status (reasoned to be equivalent to a cash grant) refrain from lobbying.<sup>60</sup> In his concurrence, Justice Blackmun found that recipients’ ability to lobby by creating an affiliate, tax-paying organization saved what would otherwise have been an unconstitutional restriction on speech.<sup>61</sup> He was satisfied that the creation of an affiliate was an adequate alternative means by which to engage in protected speech.<sup>62</sup>

<sup>55</sup> See *infra* text accompanying notes 57–85.

<sup>56</sup> Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1426 (1989); see also ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 570, 950–51 (4th ed. 2011).

<sup>57</sup> See *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984); cf. *Rust v. Sullivan*, 500 U.S. 173 (1991); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983).

<sup>58</sup> *League of Women Voters*, 468 U.S. at 400.

<sup>59</sup> See *id.* at 395. The Court was especially suspicious of the prohibition against editorializing because it prohibited expression of the station’s viewpoints. See *infra* text accompanying notes 65–72. Because “expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values,” the condition was subject to heightened scrutiny. See *League of Women Voters*, 468 U.S. at 384 (“Since . . . [t]he First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic, we must be particularly wary in assessing [the condition] to determine whether it reflects an impermissible attempt to allow a government to control the search for political truth.” (alteration in original) (citations omitted) (internal quotation marks omitted)).

<sup>60</sup> *Regan*, 461 U.S. at 554.

<sup>61</sup> *Id.* at 552 (Blackmun, J., concurring).

<sup>62</sup> *Id.*

¶16 Similarly, in *Rust v. Sullivan*, the Court upheld a restriction on “Title X” family planning funds that prohibited recipients from using the funds in programs where abortion was a method of family planning.<sup>63</sup> The Court held that recipients had adequate alternative channels to express their views on abortion, since the restriction acted only on Title X programs and did not forbid recipients from engaging in abortion-related activities using other funds.<sup>64</sup>

### B. Viewpoint-Based Discrimination

¶17 Restrictions on viewpoint-based speech may also be unconstitutional. Conditions that regulate the content of speech are suspect, as such restrictions “raise . . . the specter that the government may effectively drive certain ideas or viewpoints from the marketplace,”<sup>65</sup> especially where those topics are matters of public importance.<sup>66</sup> In *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court held that a public university magazine’s funding policy that refused funding to a Christian-based publication impermissibly impacted viewpoint-based speech.<sup>67</sup> Because the policy discriminated against a journal with a particular viewpoint, it was an unconstitutional restriction on its freedom of speech.<sup>68</sup>

¶18 The Court also invalidated a viewpoint-based restriction in *Legal Services Corp. v. Velazquez*.<sup>69</sup> There, the Legal Services Corporation Act, designed to support legal services for indigent clients, prohibited recipients from representing clients who wished to challenge existing welfare law.<sup>70</sup> By defining the scope of the legal representation it funded to exclude certain ideas, Congress imposed a viewpoint-based condition.<sup>71</sup> The Court held that the restriction impermissibly violated recipients’ First Amendment rights because it confined their ideas about their own government.<sup>72</sup>

### C. Compelled Speech Versus Compelled Silence

¶19 A condition that requires recipients to affirmatively espouse Congress’s viewpoint is more suspect than a condition that compel silence.<sup>73</sup> In *West Virginia State Board of Education v. Barnette*, the Court found that a requirement that students salute the flag in school impermissibly compelled speech, and that “involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.”<sup>74</sup> Similarly,

<sup>63</sup> 500 U.S. 173 (1991).

<sup>64</sup> *Id.* at 198.

<sup>65</sup> *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (invalidating a state law requiring an ex-convict to remit profits earned from publishing a book describing his crimes to the state on the grounds that the restriction impermissibly imposed content-based financial disincentives on speech).

<sup>66</sup> *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 384 (1984).

<sup>67</sup> 515 U.S. 819, 836–37 (1995).

<sup>68</sup> *Id.* at 830–31.

<sup>69</sup> 531 U.S. 533 (2001).

<sup>70</sup> *Id.* at 549.

<sup>71</sup> *Id.* at 542.

<sup>72</sup> *Id.* at 548.

<sup>73</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943).

<sup>74</sup> *Id.*

*Wooley v. Maynard* addressed a requirement that drivers display the state motto on their license plates.<sup>75</sup> The Court held that the requirement was an unconstitutional invasion into freedom of speech by forcing the individual to portray the state's message.<sup>76</sup> These cases suggest that Congress must present stronger interests to compel speech than to require silence.<sup>77</sup>

#### D. Government Speech

¶20 Under the government speech doctrine, Congress can condition funds that either create programs in which the government itself is the speaker or enlist private speakers to communicate its message.<sup>78</sup> Indeed, the government must be able to express itself in order to properly function and to add its viewpoints for richer public debates.<sup>79</sup> When Congress funds a program to convey a government message, it may impose speech restrictions to ensure its message is neither “garbled nor distorted” by the recipient.<sup>80</sup>

¶21 Whether speech-conditioned funds fall within the ambit of government speech turns on whether the funds act on the program or the recipient.<sup>81</sup> In *Velazquez*, for example, the Court found that Congress designed the legal clinic subsidies to regulate the private speech of the lawyers rather than to communicate government speech because the prohibition on challenges to the welfare law acted on the recipients, the lawyers, rather than on the program.<sup>82</sup> In *Rust*, on the other hand, the Title X programs were venues of government speech, transmitted by private doctors,<sup>83</sup> because the condition prohibiting abortion-related activities in the program worked on the program itself rather than on the

<sup>75</sup> 430 U.S. 705, 714 (1977).

<sup>76</sup> *Id.* at 715.

<sup>77</sup> See *Alliance for Open Soc’y Int’l, Inc. v. USAID*, 651 F.3d 218, 242 (2d Cir. 2011) (Straub, J., dissenting) (“The Supreme Court has suggested, without holding, that the government may be required to assert an even more compelling interest when it infringes the right to refrain from speaking than is required when it infringes the right to speak.”); cf. *Wooley*, 430 U.S. at 714 (“The right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’” (quoting *Barnette*, 319 U.S. at 637)).

<sup>78</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (“We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust*, in which the government used private speakers to transmit information pertaining to its own program.” (citation omitted) (internal quotation marks omitted)).

<sup>79</sup> David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 702 (1992).

<sup>80</sup> *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) (characterizing the Court’s decision in *Rust* as recognizing “that [w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.”).

<sup>81</sup> Francis R. Hill, *Speaking Truth to the Power the Funds Them: A Jurisprudence of Association for Advocacy Organizations Financially Dependent on Government Grants and Contracts*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 363, 398 (2012).

<sup>82</sup> *Velazquez*, 531 U.S. at 547.

<sup>83</sup> *Id.* at 541 (construing the condition in *Rust* as a way for Congress to “use[] private speakers to transmit information pertaining to its own program.” (internal quotation marks omitted)). “The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.” *Id.*

recipients.<sup>84</sup> Although Congress made a policy choice in *Rust* that discriminated by viewpoint, that choice was permissible because its purpose was not to suppress an unpopular idea but to choose the message of the government, the limits of which Congress was free to define.<sup>85</sup>

### *E. The Interplay of the Speech-Conditioned Funding Doctrines: Inconsistent Application*

¶22 The Supreme Court has applied each of these First Amendment funding doctrines in different combinations and in different contexts. In *League of Women Voters*, the Court reviewed both whether the television station recipients had alternative channels of communicating editorialized content and the viewpoint-based nature of the restriction against editorializing.<sup>86</sup> Combining these doctrines, the Court stated in *dicta* that if the stations had a privately-funded alternative, such a venue for editorialized broadcasts would have saved the constitutionality of the viewpoint-based nature of the restriction.<sup>87</sup> Similarly, in *Velazquez*, the Court rejected the government’s argument that restricting litigators from challenging the welfare law was a means to government speech on the matter, and instead found that the condition was an impermissible viewpoint-based restriction against challenges to the welfare law.<sup>88</sup> In *Rust*, the nature of the Title X programs as government speech and the recipients’ alternative channels to engage in abortion-related activity overrode the viewpoint-based nature of prohibiting speech on abortion.<sup>89</sup>

¶23 Although the Court has often drawn on more than one of the speech-conditioned funding doctrines to determine whether a funding condition violated free speech, it has not clarified whether or how these doctrines systematically interact with one another. Their application has been *ad hoc*, as the Court has considered some and not others in various cases, leaving little direction to future litigators. Further, the Court often has declined to articulate the controlling doctrine of each holding. The Court in *AOSI* applied the speech-conditioned funding doctrines more systematically than it has in the past by articulating a new standard for determining the constitutionality of a funding condition that implicated free speech. The following section describes the road to that decision.

## V. LEADERSHIP ACT LITIGATION

### *A. AOSI District Court*

¶24 In 2005, a group of NGOs implementing the Leadership Act challenged the Policy Requirement, which conditioned Leadership Act funds on a statement that the recipient rejects the practices of prostitution and sex trafficking, claiming that it violated their First

<sup>84</sup> *Rust v. Sullivan*, 500 U.S. 173, 194, 196 (1991) (“Title X expressly distinguishes between a Title X grantee and a Title X project . . . . The regulations govern the scope of the Title X funds project’s activities, and leave the grantee unfettered in its other activities.”).

<sup>85</sup> *Id.* at 194.

<sup>86</sup> *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984).

<sup>87</sup> *Id.* at 400–01.

<sup>88</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001).

<sup>89</sup> *Rust*, 500 U.S. at 198.

Amendment rights to free speech.<sup>90</sup> The plaintiff organizations operated international programs to fight HIV/AIDS through family planning services, sexual health counseling, and intravenous drug use education.<sup>91</sup> They sued the federal agencies primarily responsible for overseeing implementation of the Act—USAID, HHS, and CDC—seeking an injunction and a declaratory judgment that the Policy Requirement violated their First Amendment right to free speech.<sup>92</sup> They further contended that the Requirement contradicted the purpose of the Act by hindering their ability to work with sex workers to reduce their risk of contracting HIV/AIDS.<sup>93</sup>

¶25 The agencies countered that the Policy Requirement was a proper condition of federal funding within Congress’s spending power.<sup>94</sup> They further argued that one of the purposes of the Leadership Act was to eradicate prostitution and sex trafficking and that the government was not obligated to subsidize activities contrary to that goal.<sup>95</sup> Finally, the agencies asserted that the Leadership Act funds promulgated a government message that the United States denounces the practices of prostitution and sex trafficking and that the Policy Requirement was a proper means to protect that message from being garbled by recipients who would use private funds to “[endorse], either implicitly or explicitly, the very practices that the program aims to eliminate.”<sup>96</sup>

¶26 The district court issued a preliminary injunction barring the agencies from enforcing the Policy Requirement.<sup>97</sup> It found that the Policy Requirement’s suppression of “eminently debatable questions such as what may be the most appropriate or effective policy to engage high-risk groups” in efforts to combat HIV/AIDS imposed an impermissible viewpoint-based condition.<sup>98</sup> Additionally, the Policy Requirement compelled speech by forcing recipients to affirmatively denounce the practice of prostitution, making the viewpoint-based discrimination “even more offensive to the First Amendment.”<sup>99</sup> Finally, the court rejected the agencies’ assertion that the Act created a

<sup>90</sup> *Alliance for Open Soc’y Int’l, Inc. v. USAID*, 430 F. Supp. 2d 222 (S.D.N.Y. 2006).

<sup>91</sup> *Id.* at 230.

<sup>92</sup> *Id.* at 238. In 2005, DKT International, one of the largest private providers of family planning services, also challenged the constitutionality of the Policy Requirement. *DKT Int’l, Inc. v. USAID*, 435 F. Supp. 2d 5 (D.D.C. 2006), *rev’d*, 477 F.3d 758, 764 (D.C. Cir. 2007); *see also About DKT*, DKT INT’L, <http://www.dktinternational.org/about-dkt> (last visited Dec. 3, 2014). The court struck down the Policy Requirement because it was a viewpoint-based condition that was insufficiently tailored to advance the government interest in maintaining integrity of its program. *DKT Int’l*, 435 F. Supp. 2d at 5, 13–14. On appeal, the circuit court reversed, holding that the Policy Requirement was a permissible condition on a government-speech program. *DKT Int’l*, 477 F.3d at 761. The court reasoned that Congress can communicate a particular viewpoint through private speakers and may constitutionally require that those speakers do not convey contrary messages. *Id.* (“When it communicates its message, either through public officials or private entities, the government can—and often must—discriminate on the basis of viewpoint.”). The court also found that the Policy Requirement did not prevent alternative means by which DKT could engage in its speech. *Id.* at 763 (“Nothing prevents DKT from itself remaining neutral and setting up a subsidiary organization that certifies it has a policy opposing prostitution.”).

<sup>93</sup> *AOSI*, 430 F. Supp. 2d at 276.

<sup>94</sup> *Id.* at 261–62.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 278.

<sup>98</sup> *Id.* at 263.

<sup>99</sup> *Id.* at 274. It is unclear from the text whether the compulsive nature of the Policy Requirement elevated the need for heightened scrutiny. *See id.*

government speech program because the exemption of certain organizations from the condition enabled the those recipients to make endorsements contrary to the message the government claimed to protect.<sup>100</sup>

### B. AOSI Circuit Court

¶27 The agencies appealed the district court decision.<sup>101</sup> While the appeal was pending, HHS and USAID issued “organizational integrity” guidance (collectively, the “Guidelines”) designed to ameliorate the Policy Requirement’s constitutional deficiencies.<sup>102</sup> The Guidelines allowed recipients to establish affiliated organizations not bound by the Policy Requirement, provided the recipients retained “objective integrity and independence.”<sup>103</sup> A number of factors determined whether sufficient separation existed between a recipient and its affiliate, including: (1) whether the organizations were legally separate; (2) whether the organizations employed separate personnel; (3) the existence of separate accounting records; (4) whether the organizations used separate facilities; and (5) the existence of signs distinguishing between the organizations.<sup>104</sup> In light of the new Guidelines, the circuit court remanded the case.<sup>105</sup> The district court then issued another preliminary injunction,<sup>106</sup> finding that the Guidelines cured neither the Policy Requirement’s discrimination against viewpoint-based speech nor its obligation to affirmatively adopt certain speech because the Guidelines required such a stark degree of separation between the recipients and the affiliates that they were ineffectual in remedying the burden on recipients’ First Amendment rights.<sup>107</sup>

¶28 The Second Circuit affirmed the injunction.<sup>108</sup> The court rejected the agencies’ argument that the Policy Requirement protected government speech, noting that the stated purpose of the Leadership Act was to combat HIV/AIDS rather than to eradicate prostitution.<sup>109</sup> The exemption for certain organizations further supported the finding that opposing prostitution could not have been a central goal of the Act.<sup>110</sup> Further, the Guidelines did not provide adequate alternative channels for speech because an affiliate’s

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<sup>100</sup> *Id.* at 269.

<sup>101</sup> *Alliance for Open Soc’y Int’l, Inc. v. USAID*, 254 F.App’x 843 (2d Cir. 2007).

<sup>102</sup> *See* 45 C.F.R. § 89 (2014).

<sup>103</sup> *Id.* § 89.3.

<sup>104</sup> *Id.*

<sup>105</sup> *AOSI*, 254 F.App’x 843.

<sup>106</sup> The court also extended the preliminary injunction to the U.S.-based members of co-plaintiffs Global Health Council and InterAction, which include nearly all of the U.S. NGOs implementing the Act. *Alliance for Open Soc’y Int’l, Inc. v. USAID*, 570 F. Supp. 2d 533, 536–38 (S.D.N.Y. 2008).

<sup>107</sup> *See id.* at 545–49 (“While the Guidelines may or may not provide an adequate alternative channel for Plaintiffs to express their views regarding prostitution, the clause requiring Plaintiffs to adopt the Government’s view regarding the legalization of prostitution remains in tact. Plaintiffs are still not permitted to abstain from taking a view with regard to prostitution, but rather, are required to espouse the Government’s position.”).

<sup>108</sup> *Alliance for Open Soc’y Int’l, Inc. v. USAID*, 651 F.3d 218 (2d Cir. 2011).

<sup>109</sup> *Id.* at 238.

<sup>110</sup> *Id.* (The government “cannot now recast the Leadership Act’s global HIV/AIDS-prevention program as an anti-prostitution messaging campaign,” lest the First Amendment be reduced to a “simple semantic exercise.”).

ability to engage in privately-funded *silence* did not cure recipients of the affirmative speech requirement of the Act.<sup>111</sup>

## VI. SUPREME COURT DECISION

¶29 The Supreme Court affirmed the decision of the circuit court, holding that the Policy Requirement violated the recipients' First Amendment rights to free speech.<sup>112</sup> To determine whether the Requirement unconstitutionally infringed upon recipients' free speech, the Court articulated a new standard that distinguished between conditions that "define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself."<sup>113</sup> Under this standard, the relevant distinction is between conditions that Congress may properly impose to limit the use of federal funds and conditions that impermissibly leverage the spending power to control speech beyond the intent of the statute appropriating the funds.

¶30 While it is well-established that Congress may limit funding to the programs it wants to subsidize,<sup>114</sup> the limits–leverage standard contrasts that power to the leveraging of funds to regulate speech. As described above, the Court has consistently held that Congress may condition funds on behavior that it could not directly legislate as long as the condition does not violate recipients' constitutional rights.<sup>115</sup> To determine whether a funding condition that implicates free speech is unconstitutional, the limits–leverage standard asks whether the condition manipulates recipients beyond that which is necessary to protect the purpose of the federal funding program.<sup>116</sup>

¶31 Although this bilateral distinction is new, what it relies on is old. The *AOSI* Court employed the reasoning of the four traditional speech-conditioned funding doctrines to ascertain whether the Policy Requirement was a proper limit or unacceptable leverage, but applied them in a new way.<sup>117</sup> While the protection of government speech allows Congress to limit the use of federal funds, inadequate alternative channels, viewpoint-based discrimination, and compelled speech reveal conditions that unconstitutionally leverage funds. Applying the limits–leverage standard to the Policy Requirement of the Leadership Act, the Court found that the Requirement's lack of alternative channels, its

<sup>111</sup> *Id.* at 239 ("It simply does not make sense to conceive of the Guidelines here as somehow addressing the Policy Requirement's affirmative speech requirement by affording an outlet to engage in privately funded silence; in other words, by providing an outlet to do nothing at all. It may very well be that the Guidelines afford Plaintiffs an adequate outlet for expressing their opinions on prostitution, but there remains, on top of that, the additional, affirmative requirement that the recipient entity pledge its opposition to prostitution.").

<sup>112</sup> *USAID v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321 (2013).

<sup>113</sup> *Id.* at 2328.

<sup>114</sup> *See Rust v. Sullivan*, 500 U.S. 173, 194 (1991) ("[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program."); *see also supra* text accompanying notes 42–46.

<sup>115</sup> *See supra* text accompanying notes 47–54.

<sup>116</sup> *AOSI*, 133 S. Ct. at 2328 ("Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." (quoting *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001))).

<sup>117</sup> *See infra* text accompanying notes 119–136.

viewpoint-based discrimination, and its compulsory nature, in addition to its failure to act as a protection of government speech, revealed that the Requirement fell clearly outside of the permissible limitations of a government spending program.<sup>118</sup> This section outlines the consolidation of the traditional speech-conditioned funding doctrines into the new limits–leverage standard.

#### A. *Alternative Channels Test*

¶32 To determine whether the Policy Requirement allowed Congress to leverage funds to regulate speech outside the scope of the Leadership Act, the Court looked to whether the Policy Requirement tolerated alternative channels for expression on prostitution.<sup>119</sup> Finding that a “recipient cannot avow the belief dictated by the Policy Requirement when spending Leadership Act funds, and . . . assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime,” the Court concluded that Leadership Act recipients did not have alternative channels to express their views on prostitution.<sup>120</sup>

¶33 The Court analogized to *League of Women Voters*, in which the Court struck down a condition that prohibited broadcasting recipients from any editorializing.<sup>121</sup> The *AOSI* Court emphasized that the condition went beyond the stated purpose of ensuring that federal funds were not used to editorialize public broadcasting and instead “leveraged the federal funding to regulate the stations’ speech outside the scope of the program.”<sup>122</sup> Applying the alternative channels test to the Policy Requirement, the Court found that because it prohibited recipients from acting contrary to the pledge against prostitution, even when using private funds, it regulated conduct outside of the program.<sup>123</sup>

¶34 The Court rejected the agencies’ argument that the Guidelines served as an adequate channel, finding that the establishment of an affiliate cures the infringement of free speech only when the affiliate “allow[s] an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the federal program.”<sup>124</sup> Here, affiliates could not serve that purpose, since they had to be sufficiently separate from the recipient such that “the arrangement does not afford a means for the *recipient* to express *its* beliefs.”<sup>125</sup> Because the Guidelines did not allow recipients to express their views on prostitution, the Policy Requirement left no room for alternative channels of expression.<sup>126</sup>

<sup>118</sup> See *AOSI*, 133 S. Ct. 2321.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 2330.

<sup>121</sup> *Id.*; *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 399 (1984).

<sup>122</sup> *AOSI*, 133 S. Ct. at 2329.

<sup>123</sup> See *id.* at 2330. While the agencies’ second appeal was pending, USAID and HHS promulgated regulations and guidance that prohibited non-exempted recipients from “engag[ing] in activities that are inconsistent with their opposition to prostitution and sex trafficking.” HHS Organization Integrity of Entities That Are Implementing Programs and Activities Under the Leadership Act, 75 Fed. Reg. 18,760, 18,760 (Apr. 13, 2010) (codified in part at 45 C.F.R. § 89 (2014)); see USAID Acquisition & Assistance Policy Directive 05-04 amend. 3, Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, as amended – Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking (2010).

<sup>124</sup> *AOSI*, 133 S. Ct. at 2331.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*



### B. Viewpoint-Based Discrimination

¶35 The Court continued by analyzing the Policy Requirement under the viewpoint-based discrimination theory. The Court found that because the Act required that recipients espouse the government’s position on “an issue of public concern, the condition by its very nature affects ‘protected conduct outside the scope of the federally funded program.’”<sup>127</sup> Thus, the Court reasoned, the Requirement crossed the line from defining a federally-funded program to using funds to regulate beyond it by defining the recipient’s views on a controversial issue.<sup>128</sup>

### C. Compelled Speech Versus Compelled Silence

¶36 As further evidence that the Policy Requirement allowed Congress to regulate outside the Leadership Act program, the Court also highlighted its affirmative nature. The Requirement “compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program.”<sup>129</sup> By forcing recipients to affirmatively declare opposition to prostitution, the condition regulated policy beyond the program to combat HIV/AIDS.<sup>130</sup>

### D. Government Speech

¶37 To further draw the distinction between proper limits and impermissible leveraging, the Court inquired whether the Leadership Act established government speech that Congress may properly protect.<sup>131</sup> In *Rust*, Congress could prohibit funds from being used in programs where abortion was a method of family planning, as the restriction was meant to control the governmental message conveyed by the Title X programs.<sup>132</sup> According to the *AOSI* Court, Congress defined Title X to encourage only certain methods of family planning, such that the “regulations were simply designed to ensure that the limits of the federal program are observed, and that public funds [are] spent for the purposes for which they were authorized.”<sup>133</sup> The Policy Requirement, on the other hand, fell beyond the confines of government speech because it acted on the recipient rather than on the government program.<sup>134</sup> Because the Act already prohibited recipients from using the funds to “promote or advocate the legalization or practice of prostitution or sex trafficking,”<sup>135</sup> the Court found that the Policy Requirement must have been something more than a limit to protect the government’s views, thus reinforcing the line

<sup>127</sup> *Id.* at 2330 (quoting *Rust v. Sullivan*, 500 U.S. 173, 197 (1991)).

<sup>128</sup> *Id.*; see *Rust*, 500 U.S. at 197.

<sup>129</sup> *AOSI*, 133 S. Ct. at 2332.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*; see *Rust*, 500 U.S. at 197.

<sup>133</sup> *AOSI*, 133 S. Ct. at 2339–30 (alteration in original) (internal quotation marks omitted). The *AOSI* Court also found that *Rust* involved a mere non-subsidy and that Congress could “selectively fund certain programs to address an issue of public concern, without funding alternative ways of addressing the same problem.” *Id.* at 2329.

<sup>134</sup> *Id.* at 2330–31 (“By requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of a federally funded program to defining the recipient.”).

<sup>135</sup> 22 U.S.C. § 7631(e) (2008).

between the specifications of a federal program and the use of funds to control behavior outside of it.<sup>136</sup>

### *E. Understanding the Limits–Leverage Standard*

¶38 The limits–leverage standard distinguishes between restrictions intended to protect the purposes of a federal spending program and those designed to regulate speech beyond those purposes. In *AOSI*, the Court reframed the existing speech-conditioned doctrines, bundling them together to decipher when a condition that encroaches on free speech unlawfully restricts recipients’ First Amendment rights.

¶39 Prior to *AOSI*, the Court often cited more than one doctrine in deciding speech-conditioned funding cases,<sup>137</sup> but never before articulated a broad standard incorporating them all. Instead, in preceding cases, the Court seemed to select one or more of the speech-conditioned funding doctrines based on the particular facts of the case. In this way, the Court can be said to have grabbed the nearest fire extinguisher to put out the precise issue at hand, without regard to other doctrines that did not immediately apply to the distinct set of facts. Unlike other areas of law that are defined, at least in form (if not in application), by clear rules, in speech-conditioned funding cases the Court has reached to the doctrine(s) that most easily applied to the specific facts. The result has been that each case internally coheres, but together the doctrines have not developed into a systematic test that allows parties to predict which speech-related conditions will be upheld and which will not.

¶40 Although the limits–leverage standard is a far cry from a bright-line rule, it employs more than a fact-specific solution to funding restrictions that infringe upon free speech by consolidating the traditional speech-conditioned funding doctrines. It is unclear whether, under the *AOSI* standard, a court may still apply only one or some of the doctrines to a particular restriction while ignoring the others. Nevertheless, the standard draws a new line between the limits of federal spending and the exploitation of funds to regulate beyond the program.

## VII. RATIONALES FOR FREE SPEECH PROTECTION FOR RECIPIENTS OF SPEECH-CONDITIONED FUNDING

¶41 The First Amendment declares that “Congress shall make no law . . . abridging the freedom of speech.”<sup>138</sup> While many rationales for protecting free speech exist, three values are particularly important: (1) search for truth and advancement of knowledge;<sup>139</sup>

<sup>136</sup> *AOSI*, 133 S. Ct. at 2331.

<sup>137</sup> See *supra* text accompanying notes 86–89.

<sup>138</sup> U.S. CONST. amend. I.

<sup>139</sup> The search for truth rationale is premised on the notion that the “ultimate good desired is better reached by free trade in ideas.” *Abrams v. United States*, 250 U.S. 616, 630 (1919); see *JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS* 51–52 (John Gray ed., Oxford University Press 1991) (1859) (“[Free speech furthers the revelation of truth because it reveals] that the received opinion may be false, and some other opinion, consequently, true; or that, the received opinion being true, a conflict with the opposite error is essential to a clear apprehension and deep feeling of its truth . . . [or] when the conflicting doctrines, instead of being one true and the other false, share the truth between them; and the nonconforming opinion is

(2) individual self-fulfillment;<sup>140</sup> and (3) effective participation in democratic politics.<sup>141</sup> Each of these justifications for protecting free speech provides a persuasive account of First Amendment doctrine, and each maintains a significant position in popular discourse and scholarship.<sup>142</sup>

¶42 Of these three rationales, however, the development of knowledge justification corresponds most exactly with conditional funding cases. This rationale is frequently explained by the “marketplace of ideas,” premised on the notion that truth and error will most easily be discovered if society may speak freely and the government does not intervene in speech and press freedom.<sup>143</sup> Under this theory, any opinion, whether wrong, partially true, or wholly correct, has value in challenging prevailing opinions.<sup>144</sup> To refuse a hearing to an opinion is to encumber both free speech and the development of truth and knowledge.<sup>145</sup>

¶43 The self-fulfillment rationale fails to explain protection for recipients of speech-conditioned funding because those recipients are almost always organizations, rather than individuals. The self-realization justification rests on human nature, asserting that free speech serves the “development of the individual’s powers and abilities” and “the individual’s control of his or her own destiny.”<sup>146</sup> While self-expression by an organization may help the individuals within it to develop their abilities or to control their future, such expression is a step removed from the individualistic nature of the self-fulfillment rationale.<sup>147</sup>

¶44 The theory of free speech as necessary for democracy is similarly ineffective for rationalizing free speech protection for funding recipients. The argument for free speech from a democratic theory rests on the assumption that in order for government to be “by

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needed to supply the remainder of the truth, of which the received doctrine embodies only a part.”); *see also* JOHN MILTON, AREOPAGITICA: A SPEECH OF MR. JOHN MILTON FOR THE LIBERTY OF UNLICENCED PRINTING, TO THE PARLIAMENT OF ENGLAND 60 (Nov. 23, 1644) (“Let [Truth] and Fals[e]hood grapple; who ever knew Truth put to the wors[e], in a free and open encounter[?]”).

<sup>140</sup> Free expression sustains self-fulfillment by allowing the exercise of human capacity to create and express through speech. David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974).

<sup>141</sup> The self-governance rationale asserts that, in a democratic system, citizens must be able to voice their views on general welfare issues so that representatives may understand the concerns and ideas of the constituency, and to ensure the public is well-informed before making decisions. GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 10–11 (3d ed. 2008) (citing ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 15, 24–27, 39 (1948)); *see also* Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUPP. CT. REV. 191, 208 (1964).

<sup>142</sup> C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990–91 (1978); *see also* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593–94 (1982).

<sup>143</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”).

<sup>144</sup> JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* 54 (John Gray ed., Oxford University Press 1991) (1859) (“[O]nly through diversity of opinion is there, in the existing state of human intellect, a chance of fair play to all sides of the truth.”).

<sup>145</sup> *Id.*

<sup>146</sup> Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 592 (1982).

<sup>147</sup> *See id.*; *see also* David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974).

the people, for the people,”<sup>148</sup> citizens must be able to engage in meaningful debate<sup>149</sup> and that citizens must be able to voice their views on public issues so that representatives may understand the concerns and ideas of the constituency.<sup>150</sup> Although organizations also participate in civil society and politics, democracy places sovereignty in individuals, not entities. Thus, the democratic theory for free speech is an insufficient justification for speech protections with respect to funding conditions.

¶45 The development of knowledge rationale justifies the protection of recipients of speech-conditioned funding. First, it applies equally well to individuals and entities, since opinions contributing to knowledge can be promulgated by either. Second, speech-related conditions on funding restrict opinions on issues of public importance from the public discourse. In fact, the Supreme Court has stated that “*the* criterion of unconstitutionality is whether the denial of the subsidy threatens to drive certain ideas or viewpoints from the marketplace.”<sup>151</sup> In *League of Women Voters*, the condition prevented broadcasters from expressing their opinions through editorializing.<sup>152</sup> In *Velazquez*, the condition prevented legal aid recipients from expressing their opinions on welfare to the courts.<sup>153</sup> In *AOSI*, the Policy Requirement restricted recipients from expressing an opinion that combaters of HIV/AIDs should work with prostitutes rather than condemn them.<sup>154</sup> These conditions removed important opinions from the public discourse and thus truncated the development of truth in those areas. Speech-conditioned funding implicates the development of knowledge theory of the First Amendment, and is scrutinized accordingly.

¶46 The *AOSI* limits–leverage standard furthers the development of knowledge rationale for protecting free speech. By incorporating the alternative channels, viewpoint-based discrimination, compelled speech, and government speech doctrines, the limits–leverage standard preserves diversity in the “marketplace of ideas.” First, the alternative channels test directly advances a variety of ideas by inquiring whether recipients have another means of expressing themselves in the market. Second, the viewpoint-based discrimination doctrine, which raises scrutiny of conditions that limit discussion of controversial topics, furthers the development of knowledge by rendering suspect conditions that seek to restrict a particular viewpoint in the marketplace of ideas.<sup>155</sup> Third, the standard’s heightened suspicion of conditions that compel certain speech recognizes that to force a recipient to profess a statement of belief directly constrains the variety of opinions in society.<sup>156</sup> Finally, the government speech doctrine recognizes that the government may express its opinions as well, contributing to the development of

<sup>148</sup> Abraham Lincoln, Pres., U.S. Gettysburg Address (Nov. 19, 1863).

<sup>149</sup> Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 208 (1964).

<sup>150</sup> GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 11 (3d ed. 2008) (citing ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 15, 24–27, 39 (1948)).

<sup>151</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 552 (2001) (emphasis added) (internal quotation marks omitted).

<sup>152</sup> *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 384 (1984).

<sup>153</sup> *Velazquez*, 531 U.S. at 541.

<sup>154</sup> *USAID v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2330 (2013).

<sup>155</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964) (“The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions.”).

<sup>156</sup> *See AOSI*, 133 S. Ct. at 2332; *see also supra* text accompanying notes 73–77.

knowledge as any other actor.<sup>157</sup> The limits–leverage standard, by incorporating a range of conditional funding doctrines, protects free speech and thus properly maintains the diversity of the marketplace of ideas.

### VIII. THE LIMITS–LEVERAGE STANDARD: LITTLE IMPACT

¶47 In theory, the limits–leverage standard is a victory for challengers to speech-related funding conditions. It not only applies the speech-conditioned funding cases more systematically than the Court’s prior tactic of applying whatever doctrine most closely fit the facts, but it supports free speech protection from speech-related funding conditions to advance the development of knowledge. Nonetheless, because *AOSI* did not extend the constitutional protection of the First Amendment to foreign recipients,<sup>158</sup> the limits–leverage standard will not be an effective means of protecting the free speech of many speech-conditioned funding recipients.

#### A. Congress Can Circumvent *AOSI* in Foreign Aid Cases

¶48 Generally, foreign nationals do not receive the same constitutional benefits as U.S. citizens, particularly when those foreign nationals are outside of the United States.<sup>159</sup> Consequently, the *AOSI* decision does not protect foreign organizations.<sup>160</sup> Thus, Congress may impose certain conditions on funding based on the identity of the recipient<sup>161</sup> and can burden funds on restrictions that would be unconstitutional if applied to U.S. recipients.<sup>162</sup> The practical implications of *AOSI* will be limited if Congress chooses to allocate funds to foreign recipients over domestic ones so that it may regulate recipients’ speech. The limits–leverage standard will neither protect free speech nor promote the development of knowledge with respect to conditions on foreign aid if its protections do not apply to recipients of speech-conditioned funds.

<sup>157</sup> Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 702 (2011). Note that government speech must be attributable to the government if the public is to be able to assess the speech with consideration of the identity of the speaker. *Id.* This principle helps to explain the Court’s insistence that government speech act only on the program itself and not on the funding recipient. *See supra* text accompanying notes 78–85.

<sup>158</sup> *See AOSI*, 133 S. Ct. 2321 (2013).

<sup>159</sup> *Id.*; David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 382 (2003).

<sup>160</sup> Following the *AOSI* decision, HHS issued interim guidance stating that while the agencies have ceased applying the Policy Requirement to U.S. organizations, they continue to apply the Requirement to foreign organizations. Interim Guidance for the Implementation of the Organizational Integrity of Entities Implementing Programs and Activities Under the Leadership Act, 79 Fed. Reg. 55,367 (Sept. 16, 2014).

<sup>161</sup> *Demore v. Kim*, 538 U.S. 510, 521 (2003) (upholding a statute imposing on foreign nationals mandatory detention pending adjudication of deportation hearings for the commission of certain crimes because in regulating immigration, “Congress regularly makes rules that would be unacceptable if applied to citizens.” (internal quotation marks omitted)).

<sup>162</sup> *DKT Memorial Fund Ltd. v. USAID*, 887 F.2d 275, 291 (D.C. Cir. 1989) (finding that the difference in treatment by Congress of foreign NGOs and domestic NGOs does not “compel the United States to change its policy to treat the foreign entities as it would domestic ones,” nor was there “public association” between the U.S. government and foreign NGOs requiring the government to fund foreign NGOs for programs contrary to U.S. foreign policy objectives.).

¶49 Congress frequently prefers to allocate foreign aid funds to foreign, rather than domestic, organizations.<sup>163</sup> Foreign organizations often have greater access to areas and people in need of foreign aid than their American counterparts.<sup>164</sup> For programs that seek to affect international human rights, foreign governance, democracy, global health, and other issues, it is often just as effective for Congress to fund foreign organizations to implement the programs as domestic ones.<sup>165</sup> Beginning in the 1980s, the U.S. government has relied increasingly on foreign NGOs to deliver developmental and humanitarian aid in aid-receiving countries, precisely because they generally have immense local and national expertise.<sup>166</sup> As a result, the number of foreign NGOs has rapidly increased since the 1990s.<sup>167</sup>

¶50 Furthermore, USAID habitually distributes federal funds conditioned on restrictions of speech to foreign NGOs. A well-known example is the Mexico City Policy, also known as the Global Gag Rule.<sup>168</sup> Enforced sporadically from 1984 to 2009, the Mexico City Policy explicitly prohibited foreign recipients of U.S. family planning grants from engaging in abortion services.<sup>169</sup> The policy precluded alternative channels for engaging in abortion-related activities because it proscribed recipients' speech regardless of whether the recipients funded the activity using public or private funds.<sup>170</sup> Although *League of Women Voters* struck down a condition on funds for U.S. recipients on the grounds that it created precisely this situation,<sup>171</sup> legal challenges to the Mexico City Policy were unsuccessful.<sup>172</sup> Consequently, some scholars argue the condition inappropriately held foreign organizations to a higher standard than their domestic counterparts, a discrepancy that both undermined fundamental constitutional values that the United States sought to promote internationally and presented the country as being hypocritical.<sup>173</sup>

<sup>163</sup> See USAID, FOREIGN AID IN THE NATIONAL INTEREST: PROMOTING FREEDOM, SECURITY, AND OPPORTUNITY 117 (2002).

<sup>164</sup> *Id.*

<sup>165</sup> See *id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *What You Need to Know About the Global Gag Rule Restrictions on U.S. Family Planning Assistance*, POPULATION ACTION INT'L, <http://populationaction.org/advocacy-guides/what-you-need-to-know-about-the-global-gag-rule-restrictions-on-u-s-family-planning-assistance/> (last updated July 11, 2006).

<sup>169</sup> *Id.* Exceptions were made only for cases of rape, incest, and medical emergency. *Id.*

<sup>170</sup> Nina J. Crimm, *The Global Gag Rule: Undermining Nat'l Interests by Doing Unto Foreign Women and NGOs What Cannot Be Done at Home*, 40 CORNELL INT'L L.J. 587, 631 (2007).

<sup>171</sup> See *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 366 (1984).

<sup>172</sup> See *Planned Parenthood Fed'n of Am., Inc. v. USAID*, 915 F.2d 59 (2d Cir. 1990) (holding that the Mexico City Policy was a permissible condition on federal funds because it was rationally related to the government's interest in preventing federal funds from being used to promote abortion and that the speech-conditioned funding doctrines did not apply to foreign recipients and thus did not raise the level of scrutiny of the condition); see also *DKT Memorial Fund Ltd. v. USAID*, 887 F.2d 275, 284 (D.C. Cir. 1989) ("[T]he Supreme Court has never limited its absolute wording of the principle that nonresident aliens are without First Amendment rights."); *Pathfinder Fund v. USAID*, 746 F. Supp. 192 (D.D.C. 1990).

<sup>173</sup> Nina J. Crimm, *The Global Gag Rule: Undermining Nat'l Interests by Doing Unto Foreign Women and NGOs What Cannot Be Done at Home*, 40 CORNELL INT'L L.J. 587, 630–31 (2007). Although President Obama rescinded the policy upon taking office, the 1973 Helms Amendment, which prohibits the use of U.S. government funds to advocate or perform abortion services as a method of family planning anywhere in the world, remains intact. Jake Tapper, Sunlen Miller, & Human Khan, *Obama Overturns 'Mexico City Policy' Implemented by Reagan*, ABC NEWS (Jan. 23, 2009),

¶51 More recently, Congress, through USAID, has continued to condition funds to foreign NGOs on restrictions of free speech through its funding application process. For example, pursuant to the Paraguay Democracy and Governance Program, USAID called for applications for funding solely from Paraguayan organizations.<sup>174</sup> USAID required that the program “be implemented by a local organization”; as such, applicants must have been organized under the laws of Paraguay with their principal places of business in Paraguay.<sup>175</sup> Similarly, as part of the Vietnamese branch of its Strategic Information Capacity for Sustainable HIV Response Program, USAID called only for applications from local Vietnamese organizations, requiring applicants to be similarly tied to Vietnam as the Paraguay program.<sup>176</sup>

¶52 In USAID’s Afghanistan’s Counter Trafficking in Persons Program, the agency called for applicants with “local knowledge.”<sup>177</sup> The application articulated the need for NGO partners with a “solid understanding” of local values and customs with respect to human trafficking.<sup>178</sup> Although applications were not explicitly limited to foreign organizations, intimate knowledge of the country conditions was an explicit requirement of the program.<sup>179</sup> If it finds that foreign organizations have a more intimate knowledge of local conditions, USAID can limit actual distribution of funds to foreign recipients.<sup>180</sup>

¶53 Note that each of these programs specifically targets USAID goals in certain countries. USAID can funnel broader international goals into specific countries to target local applicants.<sup>181</sup> By confining programs to certain countries, USAID can further target foreign recipients, which will in turn allow it to impose greater conditions on speech.

## IX. CONCLUSION

¶54 In *AOSI*, the Supreme Court articulated a new standard to determine whether speech-conditioned funding encroaches on recipients’ First Amendment rights. The line the Court drew, between conditions that “define the limits of the government spending program” and those that “seek to leverage funding to regulate speech outside the contours

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<http://abcnews.go.com/Politics/International/story?id=6716958>; see also *Statement Released After the President Rescinds “Mexico City Policy,”* THE WHITE HOUSE BLOG (Jan. 24, 2009), <http://www.whitehouse.gov/blog/2009/01/24/statement-released-after-president-rescinds-mexico-city-policy>.

<sup>174</sup> Sonia Pun, *USAID/Paraguay Democracy and Governance Programs*, FUNDS FOR NGOS (July 8, 2013), <http://www.fundsforngos.org/usaidd/usaiddparaguay-democracy-governance-program/>.

<sup>175</sup> *Id.*

<sup>176</sup> Sonia Pun, *Apply for USAID/Vietnam Strengthen In-Country Strategic Information Capacity for Sustainable HIV Response Programme*, FUNDS FOR NGOS (June 18, 2014), <http://www.fundsforngos.org/vietnam/apply-usaiddvietnam-strengthen-incountry-strategic-information-capacity-sustainable-hiv-response-programme/>.

<sup>177</sup> Sonia Pun, *Afghanistan’s Counter Trafficking in Persons—USAID*, FUNDS FOR NGOS (Oct. 10, 2013), <http://www.fundsforngos.org/usaidd/afghanistans-counter-trafficking-persons-usaidd/>.

<sup>178</sup> *Id.*

<sup>179</sup> See *id.*

<sup>180</sup> See *id.*

<sup>181</sup> See Sonia Pun, *Continuum of Prevention, Care and Treatment of HIV/AIDS in Most at Risk Populations in Cameroon*, FUNDS FOR NGOS, (Nov. 22, 2013), <http://www.fundsforngos.org/grants.gov-2/continuum-prevention-care-treatment-hivaids-risk-populations-cameroon/>.

of the program itself,”<sup>182</sup> incorporated the alternative channels, viewpoint-based discrimination, compelled speech, and government speech doctrines. Applying this limits–leverage standard to the Leadership Act, the Court held that the Policy Requirement conditioning the receipt of funds on the adoption of a statement explicitly opposing the practice of prostitution unlawfully violated American recipients’ First Amendment rights to free speech.<sup>183</sup>

¶55

The limits–leverage standard creates a more systematic analysis of funding conditions that implicate free speech than the Court’s prior approach of applying whatever doctrine most closely fit the facts. It also promulgates the primary justification for protecting federal funding recipients’ freedom of speech. However, the new standard is unlikely to significantly improve protections of free speech in foreign aid programs because the First Amendment does not protect foreign organizations as robustly as it does U.S. ones. Because Congress can allocate foreign aid funding to foreign recipients if it wishes to continue to impose speech-implicating conditions on foreign aid funds, in practice the *AOSI* standard is unlikely to advance the ideals that underlie First Amendment protections for speech-conditioned funding recipients.

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<sup>182</sup> *USAID v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2328 (2013).

<sup>183</sup> *See id.*